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6 IN THE UNITED STATES DISTRICT COURT
7
8 FOR THE NORTHERN DISTRICT OF CALIFORNIA
9

10 JUSTIN MERRIMAN,
11 Plaintiff,

No. C 15-01715 WHA

12 v.

ORDER OF SERVICE

13 OFFICER SMITH, OFFICER TIERNEY,
14 OFFICER ROBINSON, DOES 1 to 50,
15 Defendants.
16 _____/

17 **INTRODUCTION**

18 This is a civil rights case filed by an inmate at San Quentin State Prison. Plaintiff was
19 granted leave to proceed *in forma pauperis*, although he is represented by counsel.

20 **STATEMENT**

21 Plaintiff Justin Merriman alleges that Officers Smith, Tierney, and Robinson unlocked
22 the cell of a death row inmate, allowing him to gain access to plaintiff's cell, where he was
23 battered and raped. He also alleges that defendants expressed that plaintiff was a "skin-head
24 racist who deserved extra punishment." Merriman brings claims under Section 1983 and for
25 intentional infliction of emotional distress. Merriman alleges that he has been treated in the
26 mental wing of San Quentin Hospital for post traumatic stress disorder following the alleged
27 rape.

28 Merriman also alleges that unnamed prison officials have removed funds from his
inmate trust fund, but that his attempts to resolve this issue through administrative process have

1 been rebuffed or destroyed by Officer Robinson. He brings a claim for breach of contract and
2 conversion on that basis.

3 ANALYSIS

4 Federal courts must engage in a preliminary screening of cases in which prisoners seek
5 redress from a governmental entity or officer or employee of a governmental entity. 28 U.S.C.
6 1915A(a). To survive this preliminary screening, a complaint must state a cognizable claim,
7 and any claims must not be frivolous, malicious, or seek monetary relief from a defendant
8 immune from such relief. 28 U.S.C. 1915A(b)(1), (2).

9 Merriman's first two complaints were dismissed. The first failed to plead any basis for
10 equitable tolling of the limitations period, and the second omitted all factual allegations (which
11 had been included as attachments in the first). Merriman has filed a second amended complaint
12 (Dkt. No. 22).

13 1. SECTION 1983 CLAIM.

14 To state a claim under Section 1983, a plaintiff must allege two essential elements: (1)
15 that a right secured by the Constitution or laws of the United States was violated, and (2) that
16 the alleged deprivation was committed by a person acting under the color of state law. *West v.*
17 *Atkins*, 487 U.S. 42, 48 (1988).

18 Merriman claims that defendants, acting under the color of law, facilitated the rape and
19 battery of plaintiff by unlocking the cell of a death row and maintaining that Merriman was
20 deserving of additional punishment. This allegation is sufficient to require a response.

21 2. INTENTIONAL INFLECTION OF EMOTIONAL DISTRESS CLAIM.

22 In California the elements of a *prima facie* case for intentional infliction of emotional
23 distress are "(1) extreme and outrageous conduct by the defendant with the intention of causing,
24 or reckless disregard of the probability of causing, emotional distress; (2) the plaintiff's
25 suffering severe or extreme emotional distress; and (3) actual and proximate causation of the
26 emotional distress by the defendant's outrageous conduct." *Davidson v. City of Westminster*, 32
27 Cal. 3d 197, 209 (1982). Merriman's claim for intentional infliction of emotional distress arises
28 out of the same facts as his Section 1983 claim. He also alleges that he has been treated for

1 PTSD resulting from the alleged rape and battery. His allegations are sufficient to survive pre-
2 screening.

3 **3. BREACH OF CONTRACT AND CONVERSION CLAIM.**


4 Merriman's final claim is that unnamed prison staff removed funds from his inmate trust
5 account and converted those funds to their own personal use. The complaint itself contains only
6 a conclusory allegation that prison officials took funds from Merriman's account. Exhibits A
7 and D to the complaint are letters from Merriman's mother describing accounting anomalies in
8 his trust account. These facts are sufficient to require a response from defendants.

9 **CONCLUSION**

10 The Clerk shall please **ISSUE SUMMONS** and the United States Marshal shall please
11 **SERVE**, without prepayment of fees, a copy of the complaint in this matter, and a copy of this
12 order upon defendants Officer Smith, Officer Tierney, and Officer Robinson. Plaintiff alleges
13 they can be found at San Quentin State Prison. A courtesy copy of the second amended
14 complaint and this order shall also be mailed to the California Attorney General's office.

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16 **IT IS SO ORDERED.**

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18 Dated: October 6, 2015.



WILLIAM ALSUP
UNITED STATES DISTRICT JUDGE